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**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

In the Matter of:

Petition to Amend Rule 39(b) of the  
Arizona Rules of Criminal Procedure

No. R-14-0022

**COMMENT OF CENTRAL  
ARIZONA CHAPTER OF THE  
NATIONAL LAWYERS GUILD  
REGARDING PETITION TO  
AMEND RULE 39(B) OF ARIZONA  
RULES OF CRIMINAL  
PROCEDURE**

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Pursuant to Rule 28 of the Arizona Rules of Supreme Court, the Central Arizona National Lawyers Guild (“Central AZ NLG”) submits the following comment to the above-referenced petition.

The National Lawyers Guild is a non-profit federation of lawyers, legal workers, and law students. Since 1937, Guild members have been using the law to advance social justice and support progressive social movements. The National Lawyers Guild has chapters across the United States, including two chapters in Arizona, The Central Arizona chapter and The Southern Arizona chapter. The

Central Arizona chapter of the National Lawyers Guild includes attorney members from the Phoenix-metro area and surrounding areas. Members include criminal defense attorneys who practice within the Superior Courts in Arizona.

## **DISCUSSION**

The Central AZ NLG opposes the proposed rule change for several reasons. First, the proposed rule change should not be adopted because it would effectively endorse a statute, A.R.S. § 13-4434, that is an unconstitutional intrusion upon the Arizona Supreme Court's rule-making authority under Arizona Constitution's separation of powers doctrine. Second, the proposed rule change will effectively deny criminal defendants due process and effective representation of counsel.

**I. The proposed rule change should not be adopted because the recently amended A.R.S. § 13-4434 violates the separation of powers doctrine.**

The Arizona Constitution commands that the legislative, executive, and judicial departments "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. art. 3. The Arizona Constitution vests the authority to establish procedural rules in criminal cases with the Arizona Supreme Court. See, Ariz. Const. art. VI § 5. While the Arizona Supreme Court has previously stated that it alone possesses the exclusive authority to establish procedural rules for Arizona courts, the legislature may pass a statute concerning court procedural rules so long as the statute does not conflict with the rules established by the Arizona Supreme

Court; in the event that a statute conflicts with a rule, the rule shall prevail. Seisinger v. Siebel, 220 Ariz. 85, 89, 203 P.3d 483, 487 (2009).

As recently as March 26, 2014, the Arizona Supreme Court interpreted A.R.S. § 13-4434(B) in the context of appellate litigation concerning a prosecuting agency's unilateral redaction of date of birth information in discovery provided to defendants in criminal litigation. *See, State ex rel. Montgomery v. Chavez ex rel. County of Maricopa*, 234 Ariz. 255, 258, 321 P.3d 420, 423 (2014) (hereinafter, "Chavez"). In Chavez, the Arizona Supreme Court stated:

Essentially, the State urges us to rewrite Rule 39(b) and § 13-4434 to better shield certain victim-related information. That argument, however, should be brought through different channels. **Whether the disclosure requirements should be revised in light of technological advances is better addressed through a rule change or statutory amendment, either of which would allow broad input and consideration of the policy implications.**

State ex rel. Montgomery v. Chavez ex rel. County of Maricopa, 234 Ariz. 255, 258, 321 P.3d 420, 423 (2014) (emphasis added).

While the Arizona Legislature did subsequently act to amend the statute, it does not appear that the amendment to the statute was made through a process that allowed for "broad input and consideration of the policy implications" of the amendment. The Arizona Legislature passed HB 2454, which was titled as a bill "Relating to Human Trafficking," on April 16, 2014. *See*, H.B. 2454, 51<sup>st</sup> Leg., 2d Sess. (2014). The Governor signed the bill on April 22, 2014. There appears to

have been little to no time for the “broad input and consideration of the policy implications” regarding the amendment to A.R.S. § 13-4434. The legislative history suggests that the amendment to the bill was tacked on by the Senate shortly after the Arizona Supreme Court’s decision in Chavez was published on March 26, 2014. This is demonstrated by copies of the House Summaries and Senate Fact Sheets concerning HB 2454. As of March 11, 2014, the Senate Fact Sheet contains no reference to amending A.R.S. § 13-4434(B) regarding procedural rules for disclosing the birth dates of alleged victims. *See*, Senate Fact Sheet: HB 2454, available at [http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/51leg/2r/summary/s.2454jud\\_aspassedcommittee.doc.htm&Session\\_ID=112](http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/51leg/2r/summary/s.2454jud_aspassedcommittee.doc.htm&Session_ID=112) (last accessed Sept. 24, 2014). Similarly, as of February 28, 2014, no mention of amending A.R.S. § 13-4434(B) was present in the House Summary. *See*, House Summary: HB 2454, available at [http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/51leg/2r/summary/hb2454\\_02-27-14\\_houseengrossed.doc.htm&Session\\_ID=112](http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/51leg/2r/summary/hb2454_02-27-14_houseengrossed.doc.htm&Session_ID=112) (last accessed Sept. 24, 2014).

However, the Arizona Senate acted quickly after the Chavez decision was issued by tacking on a “Miscellaneous Amendment” that was reflected in the April 15, 2014 House Summary as follows:

Expand the identifying or locating information that is subject to the victim's right to privacy.

- Require prosecution agencies to redact this information from records and specifies that the records include discovery disclosed to the defendant.

- Declare the Legislature's intent to protect the privacy of crime victims by preventing the disclosure of identifying or locating information in agency records pertaining to the criminal case involving the victim.

*See*, House Summary: HB 2454, available at [http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/51leg/2r/summary/hb2454\\_concurrefusememo.doc.htm&Session\\_ID=112](http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/51leg/2r/summary/hb2454_concurrefusememo.doc.htm&Session_ID=112) (last accessed on Sept. 24, 2014).

The speed by which the Arizona Legislature adopted the amendment to A.R.S. § 13-4434(B), combined with the way the law was amended by adding a portion to a human sex-trafficking bill, should give rise to serious concern by the Arizona Supreme Court as to whether the amendment to A.R.S. § 13-4434 was made with “broad input and consideration of the policy implications” or whether the amendment to A.R.S. § 13-4434 was nothing more than a bold attempt by members of the Arizona Legislature to sneak a substantive criminal procedure rule change into an unrelated bill so that other legislators could be tricked into usurping the rule-making authority of the Arizona Supreme Court.

The Arizona Supreme Court should not condone the potentially unconstitutional actions of the Arizona Legislature by passing the proposed amendment to Rule 39(b).

**II. The proposed rule change will interfere with a defendant's right to receive a fair and speedy trial by unnecessarily limiting the defendant's attorney ability to adequately investigate and prepare a defense while also creating ethical dilemmas for defense attorneys in complying with necessary conflict checks.**

Less than a month before the Governor signed the bill "Related to Human Trafficking" known as HB 2454, the Arizona Supreme Court had explained the reasons why it opposed a prosecuting agency's attempt to re-write Rule 39(b) of the Arizona Rules of Criminal Procedure through criminal litigation. The explanation provided, in part:

Although victims have privacy interests in their birth dates, both prosecutors and the defense have good reasons to seek this information. For example, a birth date may help identify the victim of a crime. Likewise, a victim's exact age may be relevant as an element of an offense or as a factor for determining the corresponding punishment. A birth date may also allow the parties to determine if the victim has a criminal history, which can affect the victim's credibility, and may allow defense counsel to identify possible conflicts that could prevent counsel from representing a defendant.

State ex rel. Montgomery v. Chavez ex rel. County of Maricopa, 234 Ariz. 255, 258, 321 P.3d 420, 423 (2014)

For these reasons, and also for the reasons stated in the Comment of the Maricopa County Public Defender's Office Regarding Petition to Amend Rule 39(B) of Arizona Rules of Criminal Procedure and the reasons provided by the Comment of the Defense Subcommittee of the State Bar's Criminal Practice & Procedure Committee, the Central AZ NLG opposes the proposed rule change.

### **III. Conclusion**

The Central AZ NLG opposes the adoption of the proposed amendment to Rule 39(b) of the Arizona Rules of Criminal Procedure. Not only would the adoption of the proposed amendment appear to explicitly endorse an unconstitutional usurpation of the Arizona Supreme Court's rule-making authority, it will also construct unnecessary hurdles to a defendant's right to effective assistance of counsel while creating ethical dilemmas for defense attorneys who represent them.

RESPECTFULLY SUBMITTED this 25th day of September, 2014

*CENTRAL ARIZONA NATIONAL LAWYERS GUILD*

By /s/Kevin D. Heade  
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Electronic copy filed with the  
Clerk of Supreme Court of Arizona  
this 25th day of September, 2014

By /s/Kevin D. Heade  
KEVIN D. HEADE